

Lawyer Insights

Troubleshooting Remote I-9 Compliance During COVID-19

By Adam Rosser and Suzan Kern
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As employers throughout the U.S. increasingly move to remote work arrangements for employees, they are confronted with challenges in completing Form I-9. An employer must inspect an employee's original identity and employment authorization documents in the physical presence of the employee within three business days after employment begins.

For remote hires, and for reverification of current employees working remotely, government agencies have relaxed some I-9 requirements, and companies are developing temporary procedures to ensure compliance during the COVID-19 crisis.

Government Agencies Announce Temporary Rules

On March 20, [U.S. Immigration and Customs Enforcement](#), the agency that enforces I-9 laws and regulations, announced that employers taking physical proximity precautions during COVID-19 are no longer required to inspect original documents in person.¹

Electronic review must still be completed during the normal time period, however, and original documents must be inspected within three business days after normal operations resume. This temporary rule is effective for 60 days or until three days after the national emergency ends, whichever comes first.

Unclear Provisions

While welcome, this measure still falls short of the goal — allowing employers to implement safe social distancing without fear of liability for I-9 violations — due to the following unclear provisions:

Which Employers are Eligible

The rule says “if there are employees physically present at a work location,” in-person document review is still required. How many employees must be present for the in-person rule to be triggered? Must the entire worksite be shuttered for remote I-9 completion to be available? For example, if the entire human resources department, as well as the new hire, are working remotely, but a skeleton staff is still present at the work location, is in-person document review required or not?

Which Employees are Eligible

The rule says if a specific employee is subject to COVID-19 quarantine or lockdown, the employer may avail itself of the relaxed rule for that employee, but that decision is subject to [U.S. Department of Homeland Security](#) review on a case-by-case basis. Presumably, a state, city or county shelter-in-place order would justify the decision, but in the absence of such an order, what documentation is required?

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And will ICE allow remote I-9 completion if the employee is voluntarily self-isolating rather than ordered into quarantine by a medical or government official?

How Long the Employer Remains Eligible

It is unclear what employers will need to do if the rule expires, but the company is still unable to resume normal business operations. DHS guidance says only to “monitor the DHS and ICE websites for additional updates about when the extensions will be terminated, and normal operations will resume.”²

What if the national emergency is terminated and DHS terminates the extension, but the employer’s workplace is still on local lockdown? Will ICE continue to allow electronic I-9 completion on a case-by-case basis?

These questions lead to the following general suggestions. Employers who are able to utilize one of the remote hiring options discussed below may attain a higher level of I-9 compliance, as compared to those who rely on the temporary rule in the absence of clearer guidance.

Employers who use software that includes an I-9 remote hire function may choose to continue doing so, following guidance from their software providers, and delay in-person inspection under the temporary rule as an alternative to using an unfamiliar Authorized Representative, as discussed below.

E-Verify Update

On March 20, the DHS also announced that all E-Verify requirements remain in place, except the time frame for an employee to respond to a tentative nonconfirmation notice is extended due to office closures by the [Social Security Administration](#) and the DHS.³ During the extended time frame, employers are prohibited from taking any adverse action against the employee.

Again, while flexibility is welcome, the government guidance is unclear as to which types of tentative nonconfirmation notices and as to how much additional time will be allowed. Employers and employees should continue to follow the specific guidance provided in the E-Verify system and on any tentative nonconfirmation notices.

Software for Remote I-9 Completion with Authorized Representatives

Commercial software is available that allows an employer to designate an authorized representative to inspect documents in person and complete Section 2 of Form I-9. An authorized representative can be anyone designated by the employer, but the employer remains fully liable for all actions the representative takes on its behalf, including errors and violations.

Advantages of these systems include:

Ease of Use

Features built into the software make it easy for all parties to carry out their respective steps without special training or expertise.

Complete Solution

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Unlike systems that allow on-site I-9 completion electronically but require paper I-9 records for remote hires, software that integrates remote I-9s allows the entire record to be created electronically within the same system. In addition, these integrated systems submit remote I-9s to the employer's E-Verify account automatically.

Trained Authorized Representatives

Remote I-9 software typically offers access to a nationwide network of trained authorized representatives who are trusted by the software provider. Using such a network avoids the employer having to provide clear instructions and training for an inexperienced authorized representative, or having to use an authorized representative who has a relationship with the employee and may be motivated to overlook concerns with documents.

These advanced I-9 software systems may not be practical for all employers. The increased cost of using such a sophisticated I-9 system may be warranted in light of potential fines and increasing government investigations and audits, but some businesses do not have the budget for one more stand-alone HR system. In addition, these electronic systems may not work seamlessly with some existing HR systems.

Customized Remote I-9 Solutions

Employers who do not utilize specialized I-9 software that incorporates remote features can design their own solutions by working with immigration counsel to develop policies and instructions for HR personnel, remote employees and authorized representatives.

These solutions generally include the following steps:

- Instructing the employee to complete Section 1 of Form I-9 on the first date of employment;
- Instructing the authorized representative (typically, someone identified by the employee) to complete Section 2 of Form I-9 in the employee's presence,
- Instructing HR personnel to review copies of Form I-9 and the employee's identity and employment eligibility documents in real time, while the authorized representative is reviewing them, or immediately after completion, in order to verify compliance;
- Developing a strategy for E-Verify submission within three days after employment begins, for those employers who participate in E-Verify; and
- Designing a method for converting paper I-9 forms into electronic I-9 forms, while maintaining audit trail and documentation (including original paper form), if employer wishes to do so, and depending on capabilities of the employer's software system.

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California Restrictions

California employers should be aware of restrictions on notaries public serving as authorized representatives. In California, a notary who is not also a qualified and bonded immigration consultant is prohibited from completing Form I-9 on an employer's behalf, even if the notary is acting in a personal, not official, capacity.

I-9 compliance is already one of the most complicated and overlooked aspects of immigration law. With DHS enforcement activities on an upswing, employers increasingly risk significant fines for noncompliance. Completing I-9 forms remotely, particularly companies faced with the sudden need for remote hiring due to COVID-19, raises additional challenges that require extra attention and planning.

Notes

1. <https://www.ice.gov/news/releases/dhs-announces-flexibility-requirements-related-form-i-9-compliance>.
2. <https://www.uscis.gov/i-9-central/whats-new/whats-new>.
3. <https://www.e-verify.gov/about-e-verify/whats-new>.

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